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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 771

UNITED STATES OF AMERICA, PETITIONER,

vs.

DAVID DIAMOND, also known as DAVID DUMANUS, DAVID THORNSON and ABE SLATER,

and

FREEDA DIAMOND, also known as FRIEDA DIAMOND and FLORENCE SLATER.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR DAVID DIAMOND AND FREEDA DIAMOND IN OPPOSITION.

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Question Presented.

Whether the introduction of affidavits of good cause into evidence, over the objections of defendants' counsel, during the course of the trial for denaturalization, was a sufficient compliance with Section 340(a) of the Immigration and Nationality Act of 1952 (66 Stat. 260, 8 U. S. C. 1451(a)) which requires the filing of an affidavit of good cause as a prerequisite to institution of denaturalization proceedings.

Statute Involved.

Section 340(a), Immigration and Nationality Act of 1952 (66 Stat. 260, 8 U. S. C. 1451(a)), provides:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Sec. 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization. . . ."

Statement.

On November 1, 1954 the Government filed separate complaints against respondents to set aside their naturalization. No affidavits of good cause were filed prior to or with the complaints.

In March of 1955 respondents filed motions to dismiss the complaints on the ground that the court had no jurisdiction to proceed because affidavits of good cause had not been filed. The motions were denied on the authority of *Schwinn v. United States,* 112 F. 2d 74, affirmed, 311 U. S. 616. The respondents then filed their answers; the cases were consolidated for trial; and trial commenced on February 28, 1956.

On the opening day of trial petitioner offered affidavits of good cause into evidence and they were accepted by the trial judge over respondents' objection. It was then stipulated that the United States Attorney had these affidavits in his possession at the time the complaints were filed, that they were shown to counsel for one of the defendants at

one of the pretrial proceedings[1] and that counsel was informed that the affidavits would be offered into evidence during the trial. [R. 124-126.] Counsel for respondents were served copies of the affidavits on February 29, 1956, the second day of trial, and the trial proceeded.

At the conclusion of the Government's case on March 2, 1956, the trial was continued. Prior to the resumption of trial on May 4, 1956 this Court rendered its decision in *United States v. Zucca,* 351 U. S. 91; respondents rested their case without introduction of evidence, citing that decision to the trial court. On July 26, 1956, after the parties had briefed the effect of the *Zucca* case on the doctrine of the *Schwinn* case, the trial judge dismissed the within actions without prejudice. The Court of Appeals for the Ninth Circuit affirmed.

Argument.

1. Petitioner has presented to this Court no ground for granting the petition for a writ of certiorari within the meaning of Rule 19 of the Supreme Court Rules. The decision below is not in conflict with the applicable decisions of this Court, but rather is consistent with such decisions. In *United States v. Zucca, supra,* at p. 100, this Court stated that the Government must "as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause". This Court further stated (at p. 99):

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation

[1]The pretrial proceeding referred to in the record was the taking of a deposition on February 14, 1956, two weeks prior to commencement of trial.

> is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause."

Trial already had commenced when the affidavits in the instant case were filed with the trial court as exhibits and when copies were served upon counsel. Clearly, this action cannot be considered as either satisfying a procedural prerequisite to the "initiation" of an action for denaturalization or a "preliminary showing of good cause."

Petitioner further contends that the judgment below is in conflict with judgments rendered by the Court of Appeals for the Second Circuit in *United States v. Lucchese,* 247 F. 2d 123 (C. A. 2), petition for a writ of certiorari pending, No. 450, this Term; *United States v. Costello,* 247 F. 2d 384, 387 (C. A. 2), petition for a writ of certiori pending, No. 494, this Term, and *United States v. Matles,* 247 F. 2d 378 (C. A. 2), petition for a writ of certiorari pending, No. 378, this Term. In these cases the Second Circuit appears to be in conflict with the principles enunciated in the *Zucca* case since it reversed dismissals of denaturalization suits when the affidavits of good cause were not filed prior to or at the time of filing the complaint. As the Court of Appeals for the Ninth Circuit indicated in its decision below, however, a fruitful comparison cannot be made between the instant case and those cited by petitioner as they present facts somewhat different than those here. In the *Lucchese* case an affidavit of good cause was filed on November 23, 1955; trial has never even commenced in that case since the action was dismissed prior to trial for failure to file an affidavit of

good cause. In *Costello* an affidavit of good cause was filed on November 17, 1955 and trial did not commence until September 25, 1956. In *Matles,* although the complaint was filed without the affidavit of good cause, an amended complaint was later filed and, by stipulation, an affidavit of good cause was filed with the amended complaint on September 16, 1953.

Thus, the factual situation in the instant case, where no affidavit was filed until after the opening of trial, basically differs from the cases where the affidavit was filed and served long before trial began.

The mere existence of the affidavits in the possession of the United States Attorney does not satisfy the statutory requirement that the affidavit be filed as a prerequisite to maintenance of the action[2]. This Court stated at p. 100 of the *Zucca* opinion:

> "We believe that not only in some cases but in all cases the District Attorney must, as a prerequisite to the *initiation* of such proceeding, *file* an affidavit showing good cause." (Emphasis added.)

The failure to file the affidavits with the trial court to initiate the proceedings left the trial court with no alternative but to dismiss the action.

2. The question of the legal sufficiency of the affidavits, which eventually were filed with the trial court as exhibits, is not now presented to this Court by petitioner. There already has been urged upon this Court the view that an affidavit of good cause not based on personal knowledge,

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[2]The exhibition of an affidavit to counsel for one of the respondents during a pretrial proceeding only proved that the affidavit was then in existence, a fact which was never disputed by respondents.

but upon information obtained from the records of Immigration & Naturalization Service, is insufficient to meet the requirements of the statute. *Nowak v. United States*, 238 F. 2d 282, Docket No. 72, and *Maisenberg v. United States*, 238 F. 2d 282, Docket No. 76, present this issue. Since the affidavits filed in the instant case as exhibits below were of a similar nature to those which were filed in the cited cases (R. 124-126) a decision of this Court holding such affidavits to be an insufficient compliance with the statutory requirement would of necessity moot the question sought to be presented by the instant petition.

Conclusion.

For the above reasons it is respectfully submitted that the judgment below is a correct disposition upon principles established by this Court, and the petition for a writ of certiorari, therefore, should be denied.

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Dated: February 27, 1958.